(2)

No. 95-1812

Supreme Court, U.S.
FILED
JUN 6 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE MASON & DIXON LINES, INC.,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

and

CENTRAL TRANSPORT, INC. and CENTRAL CARTAGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

QUESTIONS PRESENTED

1. Whether an attorney fee award at market rates to a litigant represented by in-house counsel constitutes fee sharing since the attorney never had a right to receive or exercise control over any part of the fee award.

2. Whether the market rate is the best measure of the value of the services of in-house counsel because unlike a cost based calculation, the market rate reimburses the prevailing party for the delay caused by devoting legal resources to a particular case instead of other legal matters and frees the courts from potentially complex, lengthy litigation over the allocation of operating costs to legal activities.

STATEMENT PURSUANT TO RULE 29(6)

None of the Respondents are corporations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Central Cartage and Central Transport Litigation	1
B. Mason Litigation	3
REASONS FOR DENYING THE WRIT	5
I. EVEN IF THE COURT OF APPEALS DECISION IS INCORRECT, PETITIONERS WILL NOT PREVAIL BECAUSE THEY ARE BARRED FROM CHALLENGING THE MARKET RATE STANDARD BY THE DOCTRINES OF ISSUE PRECLUSION OR WAIVER	6
II. THE CASES RELIED UPON BY PETITIONERS ARE DISTINGUISHABLE SO THERE IS NO CONFLICT BETWEEN THE CIRCUITS	7
A. Petitioners Cases Are Distinguishable Because They All Involve Fee Awards In Favor Of A Non-Party	7
B. Petitioners Cases Are Distinguishable Because The Courts Were Not Required To Consider Opportunity Cost Or The Difficulty In Allocating Business Costs To Legal Operations	10
C. Petitioners' Cases Are Distinguishable Because They Did Not Involve Suits By Non-Profit Organizations Under Legislation Intended To Encourage Private Enforcement Actions	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases Page

Anderson v. Department of Treasury, 648 F.2d 1 (D.C. Cir. 1979), supplemental opinion sub nom.. 7, 8, 9
Avitia v. Metropolitan Club of Chicago, Inc., 924 F.2d 689 (7th Cir. 1991) 6
Blum v. Stenson, 465 U.S. 886 (1984) 2, 3, 5, 12
Central States Pension Fund v. Central Cartage Co., 861 F.Supp. 1402 (N.D. Ill. 1994), *aff'd sub nom.*, 69 F.3d 1312 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996) 2
Central States Pension Fund v. Central Cartage Co., No. 94-3823 (7th Cir. Jan. 22, 1996) 4
Central Transport, Inc. v. Four Phase Systems, Inc., 936 F.2d 256 (6th Cir. 1991) 7
Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1984), *cert. denied*, 484 U.S. 815 (1987) 7, 8, 12
Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 7, 8, 12
Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992) 7, 8
Hensley v. Eckerhart, 461 U.S. 424 (1983) 11
In re: Teltronics Services, Inc., 762 F.2d 185 (2nd Cir. 1985) 7
Maggio v. Zeitz, 333 U.S. 56 (1948) 6
National Treasury Employees Union v. Department of Treasury, 656 F.2d 848 (D.C. Cir. 1981) 7
Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983) 6
State of Illinois v. Sangamo Construction Co., 657 F.2d 855 (7th Cir. 1981) 11
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959), *reh'g denied*, 359 U.S. 999 (1959) 6

Statutes

29 U.S.C. § 1131(g)(1) 4
29 U.S.C. § 1132(a)(3) 3
29 U.S.C. § 1132(g)(1) 9

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1132(g) (2) (B)	12
29 U.S.C. § 1132(g) (2) (C)	12
29 U.S.C. § 1132(g) (2) (D)	2, 12
29 U.S.C. § 1145	12
Other Authorities	
126 Cong. Rec. 23039 (Rep. Thompson)	12
126 Cong. Rec. 23288 (Sen. Williams)	12
1983 ABA Model Rules. American Bar Association Jnformal Opinion 85-1510	8
American Bar Association's Committee on Ethics and Professional Responsibility Formal Opinion 95-392	9
Restatement of Judgments § 27 (1982)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1812

THE MASON & DIXON LINES, INC.,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

and

CENTRAL TRANSPORT, INC. and CENTRAL CARTAGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Central Cartage and Central Transport Litigation.

The Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (collectively "Central States") sued Central Cartage Co. ("Cartage") and Central Transport, Inc. ("Transport") to collect delinquent fringe benefit contributions. After the district court granted Central States' summary judgment motion

against Cartage, *Central States Pension Fund v. Central Cartage Co.*, 861 F.Supp. 1402 (N.D. Ill. 1994), *aff'd sub nom.*, 69 F.3d 1312 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996), Central States requested an award of attorneys' fees pursuant to § 502(g)(2)(D) of ERISA. 29 U.S.C. § 1132(g)(2)(D). In an oral ruling on October 11, 1994, the district court rejected Cartage's contention that the award should be determined on a cost basis and awarded fees totaling $58,801.68 which were calculated at prevailing market rates. On February 17, 1995, the district court granted summary judgment in favor of Central States and against Transport. The district court subsequently awarded attorneys' fees against Transport totaling $24,312.56 which were calculated at market rates without any objection from Transport. Cartage and Transport filed separate appeals that were consolidated and, although they challenged the district court's ruling on the merits, neither Cartage nor Transport challenged the district court's fee awards.

After the court of appeals affirmed the judgments in favor of Central States, Central States moved for an award of appellate attorneys' fees. Transport and Cartage filed a joint response where they indicated that they "anticipate[d] that the fee petition which will be submitted by the Funds will seek compensation based upon an hourly market rate." Despite their failure to challenge the district court's market rate award in the court of appeals, Cartage and Transport argued that appellate fees should be calculated on a cost basis. They also indicated that the issue had already been fully briefed in the appeal of their corporate affiliate, The Mason and Dixon Lines, Inc. ("Mason"), and requested that the court of appeals suspend its ruling until the Mason appeal was decided.

On January 22, 1996, the court of appeals held that appellate fees should be awarded at market rates under *Blum v. Stenson*, 465 U.S. 886 (1984) and prior seventh circuit decisions. The seventh circuit recognized that two

circuits had held that *Blum* did not apply where the fee award was sought by a union rather than a non-profit legal service organization because the union could use the fee award to subsidize other aspects of its business which would create conflict with the ethical rule prohibiting attorneys from sharing their fees with non-lawyers. However, the seventh circuit concluded that there was no risk of fee sharing for two reasons. First, fee awards under ERISA belong to the litigant, not the attorney. Since the in-house attorney had no claim to the fees, all fee splitting objections were overcome.

Second, the court of appeals recognized that if a cost-based method was used, it would be necessary to not only consider attorney salary and overhead costs, but also to determine the opportunity cost to the prevailing party of using its lawyers on a particular case and either delaying other legal matters or hiring outside counsel to handle the other matters. The court of appeals believed that this "complex inquiry . . . [would] in the end likely . . . produce a comparable result [to selecting the market rate]." (Petitioners' App. p. 21a). Since the market rate calculation resulted in an award that was equal to the actual cost of in-house attorney services, the court concluded that a market rate fee award could not result in fee sharing with a client. On February 26, 1996, the court of appeals awarded appellate fees of $17,467.50 to Central States, which were calculated at what was agreed to be the market rate. (Respondents' App. 8a-9a).

B. Mason Litigation.

Central States brought suit under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to force Mason to comply with its contractual duty under the Central States' trust agreement to provide access to its payroll records for an audit that would enable Central States to determine whether Mason had paid all required pension contributions. On April 28, 1994 the district court

granted Central States' summary judgment motion and denied Mason's cross motion. Although Mason claims in its petition that it agreed to submit to the audit, the district court found that "on some occasions defendant failed to respond to plaintiffs' requests for information [and] when defendant did reply . . . its explanations for the delay were inadequate" (Respondents' App. 3). As a result, the district court held that Mason breached the Central States' trust agreement requirement that Mason "promptly furnish to the Trustees upon reasonable demand" access to payroll records (Respondents' App. 2-3). The district court ordered Mason to cooperate with the audit "as soon as possible even if it must hire additional labor" to do so and ordered Mason to pay Central States' attorney's fees pursuant to § 502(g)(1) of ERISA, 29 U.S.C. § 1131(g)(1) (Respondents' App. 2).

Despite the court's order, Mason did not provide access to a single record until Central States filed a motion for rule to show cause which in the district court's view, "certainly raises questions about the defendants' purported willingness to cooperate with the audit." (Petitioners' App. p. 5a). There is nothing in the record with respect to the results of the audit so Mason's claim that the audit revealed no delinquency is unsupported (and is actually false).

On appeal, Mason did not challenge the determination that it had violated the trust agreement and it did not contest the number of hours of work included in the fee award or the rates the district court selected as the market rate. Mason's sole argument was that the district court's adoption of the market rate standard was improper. On February 7, 1996 the court of appeals affirmed the district court fee award "on the authority of *Central States Pension Fund v. Central Cartage Co.*, No. 94-3823 (7th Cir. Jan. 22, 1996)" and held that Central States was entitled to an award of appellate fees (Petitioners' App. p. 11a). On March 13, 1996, the court of appeals

awarded appellate attorneys fees totaling $10,707.07 (Respondents' App. 10-11).

REASONS FOR DENYING THE WRIT

Even if the holding challenged by the petitioners were erroneous, Cartage and Transport failed to challenge the district court's fee award at market rates. Since the district court's award is final, Cartage and Transport are barred from challenging the award of appellate fees at the market rate by the doctrines of issue preclusion and waiver. Because Mason is in privity with Cartage, it is also barred from litigating the issue. Thus, petitioners will lose in any event so the petition should be denied.

Further, the seventh circuit decision does not conflict with other circuits because the cases cited by petitioners are distinguishable for three reasons. First, the cases relied upon by petitioners involve fee awards in favor of non-party unions that represented members under prepaid legal service plans. However, the fee awards in these cases are in favor of the litigant so no part of the award belongs to the attorney and the fee is not split. Second, the unions seeking fees in the cases cited by petitioners failed to show that it was virtually impossible to calculate actual costs. On the other hand, Central States showed that market rates had to be used to reimburse the prevailing litigant for the opportunity cost of delaying other matters to handle a particular case and freed the district court from the lengthy complex task of determining what portion of a businesses operating expense should be allocated to its law department. Third, the cases cited by petitioners are distinguishable because they do not involve fee awards sought by non-profit entities under statutes designed to encourage private enforcement actions. Under the circumstances of this case, the decision in *Blum v. Stenson*, 465 U.S. 886 (1984) requires that fees be awarded at market rates.

I. EVEN IF THE COURT OF APPEALS DECISION IS INCORRECT, PETITIONERS WILL NOT PREVAIL BECAUSE THEY ARE BARRED FROM CHALLENGING THE MARKET RATE STANDARD BY THE DOCTRINES OF ISSUE PRECLUSION OR WAIVER.

Cartage did not contest the district court's market rate award on appeal and Transport did not object to the market rate in either the district court or court of appeals. As a result, Cartage and Transport will lose on the alternate grounds of issue preclusion and waiver even if this Court reversed the court of appeals. Since it is in privity with Transport and Cartage, Mason is also precluded from challenging the market rate calculation. Under similar circumstances this Court has observed:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184 (1959).

The doctrine of issue preclusion prevents a party from relitigating an issue that has been actually litigated and determined by a valid and final judgment. Restatement of Judgments § 27 (1982). When a party fails to timely appeal a district court determination, the doctrine of issue preclusion bars relitigation of the issue in subsequent proceedings in the same case. *Maggio v. Zeitz*, 333 U.S. 56, 68-70 (1948); *Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689 (7th Cir. 1991); *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983). The district court's adoption of the market rate standard was not appealed by Cartage or Transport so the determination became

final and the issue cannot be relitigated in the context of Central States' appellate fee request. Moreover, by failing to preserve the issue, Transport and Cartage waived their right to challenge their liability for appellate fees at market rates.

Since petitioners concede that Cartage and Mason are wholly owned subsidiaries of Centra, Inc. (Petition at p. ii), they are in privity for the purpose of issue preclusion. *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256 (6th Cir. 1991) (holding that subsidiaries of Centra, Inc. are in privity for issue preclusion purposes); *In re: Teltronics Service, Inc.*, 762 F.2d 185 (2nd Cir. 1985). Therefore, the district court determination in the Cartage case binds Mason, so its challenge to the market rate fee award is also barred.

II. THE CASES RELIED UPON BY PETITIONERS ARE DISTINGUISHABLE SO THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

A. Petitioners Cases Are Distinguishable Because They All Involve Fee Awards In Favor Of A Non-Party.

According to the petitioners, the seventh circuit's decision conflicts with the decisions in *Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992); *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1984); *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984); *Anderson v. Department of Treasury*, 648 F.2d 1 (D.C. Cir. 1979), supplemental opinion sub nom, *National Treasury Employees Union v. Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (Petition pp. 9-12). However, these cases are all easily distinguishable because they involve fee awards not to a litigant, but instead to non-party unions that provided legal services to their members under prepaid legal service programs. In contrast, attorneys fees were awarded in these cases solely to the

prevailing party, Central States. This distinction is critical because the American Bar Association Standing Committee on Ethics and Professional Responsibility has determined that when a fee award is made directly to the prevailing party, the ethical concerns that were the basis of the decisions cited by petitioners are not implicated.

In *Harper, Devine, Goodrich* and *Anderson,* individuals vindicated rights under statutes that authorized fee awards. In each case, the individuals were represented by attorneys employed by unions pursuant to prepaid legal service plans. Because the services were provided under the legal services plans, the unions insisted that the fee award belonged to the union,[1] not to the litigant or the attorneys employed by the union who performed the work. Each court indicated that under these circumstances, a fee award in favor of the union at the market rate was impermissible because it would violate the ethical rules that prohibit attorneys from splitting fee awards with laymen or allowing laymen to engage in the unauthorized practice of law.[2] Petitioners readily concede that these cases involve fee awards made directly to the non-party union instead of the litigant.[3]

---

[1] In *Anderson* and *Devine,* the union was eventually the appellant, instead of the aggrieved individual whose rights were vindicated in the litigation.

[2] The *Anderson* court indicated that the fee award would violate a third rule that allowed attorneys to accept employment at an organization offering prepaid legal services only if it was operated on a not-for-profit basis. *Anderson,* 656 F.2d at 851. Since Central States is not a prepaid legal services organization, this objection is not applicable. Moreover, this restriction was lifted under the 1983 ABA Model Rules. American Bar Association Informal Opinion 85-1510.

[3] Thus, Petitioners indicate that *Devine* involved "the award of attorneys fees *to the union*", that *Harper* involved a decision "to limit the amount of attorneys fees to be awarded *to plaintiffs lawyer*" and that *Goodrich* held that "*a salaried attorney* is only

Section 502(g)(1) of ERISA authorizes a fee award to "either party," not to the attorney for either party. 29 U.S.C. § 1132(g)(1). As a result, the judgments in these cases were rendered in favor of Central States, not in favor of its in-house attorneys. And when respondents pay the fee awards, their payment will be made directly to Central States so there will be no money passing from attorney to client. Therefore, there is no danger that fees will be shared with a non-lawyer and the judgment for fees at the market rate does not implicate any ethical considerations.

The American Bar Association's Committee on Ethics and Professional Responsibility has indicated in Formal Opinion 95-392 that a fee award at market rates under the circumstances of these cases does not violate any ethical principles:

> Under certain fee-shifting arrangements the courts award legal fees to the parties. Under others the fee award is made to the lawyers. *Because in the former case the fee is directed to the corporation, no ethical question is raised; the lawyer is not placed in a position in which she is being asked to share fees with a nonlawyer.* However, it is in the latter situation, where the lawyer is awarded the fee and the corporation seeks from the lawyer some or all of the fee award, that ethical questions are raised to which this portion of the opinion is addressed.

(Respondents' Appendix 19-20) (emphasis added). Formal Opinion 95-392 then endorses the *Anderson* decision but only after noting that the fee award was sought by a union that employed the attorneys, not the prevailing litigant. Since the ethical issue that was central to the cases relied upon by petitioners does not exist in these cases, petitioners' cases are distinguishable and no conflict between the circuits exists.

---

entitled to attorneys' fees calculated at a cost-plus-overheard rate." Petitioner at pp. 10-11 (emphasis added).

B. Petitioners Cases Are Distinguishable Because The Courts Were Not Required To Consider Opportunity Cost Or The Difficulty In Allocating Business Costs To Legal Operations.

The unions in the cases cited by petitioners were required to represent their members pursuant to prepaid legal service plans. If the unions delayed in pursuing the claims, the cost of the delay was borne by the individual member, not the union. For this reason, the unions could not argue that they were entitled to be compensated for the opportunity cost of their attorneys' time.

However, because Central States is the litigant, it was forced to bear the cost of delaying other legal matters or hiring outside counsel because its in house attorneys were busy with these cases. Because this opportunity cost has to be considered in order to fully compensate Central States, the court of appeals correctly determined that the value of the services of in-house counsel was the market rate.

In addition to failing to consider opportunity costs, the cases relied upon by petitioners are distinguishable because Central States showed that calculating the costs attributable to these cases would be exceedingly difficult. Adoption of a cost based calculation would obligate the lower courts to devise a formula to pro-rate overhead expenses attributable to base rent, real estate taxes, costs of maintaining common areas, janitorial services and utilities (such as telephone, heat, electricity and water). In addition, expenses such as the amortization of capital expenditures including law library, computers, copy machines, fax machines, office dictating equipment, telephones, word processing equipment, laser printers, liability insurance and other expenses, which are shared with other departments, would also have to be prorated. To determine actual cost, it also would be necessary to attempt to prorate both the labor costs and physical building overhead of the departments of Central States other than

the law department which perform essential services for Central States' legal staff (e.g., human resources, computer operations, internal audit, payroll and mail room departments). In a private law firm that is devoted solely to the practice of law, it is not necessary to prorate these services. However, in the in-house setting, there are employees that perform many services for the non-legal aspects of the operation as well as the law department and it would be exceedingly difficult to determine an appropriate proration.

The complexity of the task of arriving at an opportunity cost for attorneys time and allocating costs is daunting and entirely inconsistent with this Court's admonition that "a request for attorney's fees should not become a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). On the other hand, using prevailing market rates to calculate fees for in-house counsel eliminates these problems and "simplifies the district court's already difficult task of awarding reasonable attorneys fees." *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 861 (7th Cir. 1981).

Petitioners argue at length that the market rate allows Central States to profit from the services of its in-house counsel. However, the court of appeals determined that the actual value of the work performed by in-house counsel was equal to the market rate. Since the market rate award compensated Central States for the actual cost of the services of in-house counsel and nothing more, Central States did not earn a profit and no fee sharing occurred.

C. Petitioners' Cases Are Distinguishable Because They Did Not Involve Suits By Non-Profit Organizations Under Legislation Intended To Encourage Private Enforcement Actions.

The cases cited by petitioners involved individuals seeking to redress adverse employment actions by the federal government or collect damages limited by statute

to $1,000. These cases are distinguishable because they were not brought by a not-for-profit entity such as Central States and did not implicate the federal policy embodied in ERISA intended to foster trustee suits filed to force employers to comply with their pension promises. Indeed, the *Goodrich* and *Devine* courts recognized that this Court's decision in *Blum* mandated that fees be awarded at market rates where, as in these cases, the prevailing party was a not-for-profit organization and the applicable statute was intended to foster private enforcement actions. *Devine*, 805 F.2d at 388; *Goodrich*, 733 F.2d at 1580-1.

When Congress amended ERISA in 1980 the sponsors of the legislation indicated that

> [D]elinquencies of employers in making required contributions are . . . a serious problem for many multiemployer plans . . . the public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.

126 Cong. Rec. 23039 (Rep. Thompson), 126 Cong. Rec. 23288 (Sen. Williams). To achieve this goal, Congress added § 515 which forecloses most employer defenses[4] and amended § 502 to make an award of attorneys fees, interest and liquidated damages mandatory when a fund obtains a judgment for delinquent contributions. 29 U.S.C. § 1132(g)(2)(B), (C) and (D) and § 1145. Because the legislative history and provisions of the statute itself demonstrate a federal policy encouraging this type of litigation, the cases cited by petitioners are distinguishable so *Blum* controls and requires that fees be awarded at market rates.

---

[4] See, *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*).

CONCLUSION

For the foregoing reasons, respondents submit that the petition for writ of certiorari be denied.

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION AND HEALTH
AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Transcript of Proceedings before the Honorable Harry D. Leinenweber on April 28, 1994 in *Central States Pension Fund v. The Mason and Dixon Lines*, No. 93 C 7497	1a
Transcript of Proceedings before the Honorable Harry D. Leinenweber on October 11, 1994 in *Central States Pension Fund v. Central Cartage Co.*, No. 91 C 6232	4a
Order of Court of Appeals dated February 26, 1996 in *Central States Pension Fund v. Central Cartage Co.*, No. 94-3823, 95-1872 and 95-1976	8a
Order of Court of Appeals dated March 13, 1996 in *Central States Pension Fund v. The Mason and Dixon Lines, Inc.*, No. 95-2026	10a
American Bar Association Formal Opinion 95-392	12a

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 93 C 7497

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS and HOWARD MCDOUGAL, TRUSTEE,
Plaintiffs,

-vs-

MASON & DIXON LINES, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE HARRY D. LEINENWEBER

Chicago, Illinois
April 28, 1994

---

[2] THE CLERK: 93 C 7497, Central States vs. Mason & Dixon Lines.

MR. MORAN: Good morning, your Honor. Patrick Moran for the defendant, Mason & Dixon Lines.

MR. COCO: Good morning, your Honor. Robert Coco appearing on behalf of plaintiff.

MR. MURDOCK: Good morning, your Honor. Grady Murdock also on behalf of defendant.

THE COURT: Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund and Howard McDougal, are a pension fund and its trustee. Both the pension fund and the trustee are subject to the requirements of the Employee Retirement Income Security Act of 1974 [ERISA], 29 U.S.C., Section 1001-1381. De-

fendant, The Mason & Dixon Lines, Inc., is a contributing employer to plaintiff's pension fund. The trust agreement between the parties in this action provides that defendant must "promptly furnish to the Trustees, upon reasonable demand" documents pertinent to defendant's contributions to the pension fund.

On June 25, 1993 plaintiffs notified defendant that they would like to review documents verifying the contributions defendant made to the pension fund. On July 25 and August 20, 1993 a representative of defendant notified plaintiffs that defendant could not [3] satisfy plaintiffs' request for a review of documents at that time. Defendant notified plaintiff that its resources were being used to respond to plaintiffs' request for document production in another case before this court. On November 30, 1993 an attorney for plaintiffs renewed their request for an audit of defendant's books. Defendant did not respond to the letter and the present suit was filed in January of 1994.

Plaintiffs have moved for summary judgment, asking the court to order defendant to give them access to records they need to investigate the contributions defendant made to the pension fund. In addition, plaintiffs maintain that they are entitled to all audit costs, attorneys fees and court costs incurred as a result of defendant's failure to respond to their request promptly.

Defendant has agreed to provide plaintiffs access to the records they seek. The Court finds that defendant must provide access as soon as possible, even if it must hire additional labor to satisfy plaintiffs' demands.

In addition, the Court finds that defendant must compensate plaintiffs for the reasonable attorney's fees they incurred as a result of bringing the present [4] action. Section 502(a)(3) of ERISA, 29 U.S.C., Section 1132 (a)(3), provides that a civil action may be brought "to redress . . . violations or to enforce any provision of the terms of the plan." Section 502 also expressly grants the Court discretion to allow "reasonable attorney's fees and costs of action to either party."

The Court finds that defendant violated the terms of the trust agreement between the parties in this case. That agreement required defendant to provide information to plaintiffs "promptly." Instead, on some occasions defendant failed to respond to plaintiffs' requests for information. When defendant did reply to plaintiffs' inquiries, its explanations for the delay were inadequate. For these reasons the Court finds that plaintiffs are entitled to their reasonable attorney's fees incurred in bringing the present action.

Lastly, the Court finds that plaintiffs must bear the costs they would ordinarily incur in auditing defendant.

Plaintiffs' motion for summary judgment is granted in part and denied in part. Defendant's motion for summary judgment is denied.

All right. Where does that leave us?

MR. COCO: That leaves us with getting an audit scheduled and conducted.

[5] THE COURT: How long will that take? You have got the documents, don't you?

MR. COCO: I recall from discussing with our auditors, and I think we indicated in our files—I don't have it in front of me. I don't want to misrepresent. But I think they said it would take four to six weeks—

MR. MORAN: Two to six.

MR. COCO: —two to six weeks to conduct the field work. And it will probably take at least a couple weeks thereafter to compile a memo.

THE COURT: How about three months for a status. If you get your audit in, you can come in ahead of time, if you want.

MR. COCO: Right. That would sound reasonable.

THE COURT: Three months.

THE CLERK: July 28th, at 9:00 a.m.

THE COURT: Thank you.

MR. MORAN: Thank you, your Honor.

MR. COCO: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 91 C 6232

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Plaintiff,

-vs-

CENTRAL TRANSPORT,
Defendant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE HARRY D. LEINENWEBER

Chicago, Illinois
October 11, 1994

---

[2] THE CLERK: 91 C 6232, Central States vs. Central Transport.

MR. MADDEN: Good morning, your Honor. Albert Madden on behalf of the plaintiffs.

MR. PARZIANELLO: Eric Parzianello on behalf of the defendants, your Honor.

THE COURT: This is a ruling.

Plaintiffs brought this ERISA action against defendants Central Transport, Inc. and Central Cartage Co. to, among other things, collect audit-revealed delinquent contributions to their funds. The funds provide pension coverage and health benefits to union employees covered by collective bargaining agreements with defendants.

On August 25, 1994 the Court granted plaintiffs' motion for summary judgment as to Count I of the com-

plaint, which involved the delinquent contributions, against both Transport and Cartage. Plaintiffs had previously won summary judgment against both defendants on Count II of the complaint, which sought access to defendants' records. Counts III and IV of the complaint were directed solely against Transport, and sought to recover a debt originally incurred by a company that later merged with Transport on two alternative theories of recovery. Transport was granted summary judgment [3] as to Count III in the August 25 order. Count IV was found to involve disputed material facts, and is still at issue.

Pursuant to Rule 54(b), plaintiffs now request that a final judgment be entered in their favor against Cartage in the following amounts: 1. Central States, Southeast and Southwest Areas Pension Fund: $1,944,626.60 in delinquent contributions and $1,892,528.90 in doubled interest, as of 10/11/94, for $3,837,155.50. 2. Central States, Southeast and Southwest Areas Health & Welfare Fund: $52,504.20 in delinquent contributions and $49,861.38 in doubled interest, as of 10/11/94, for $102,365.58.

Interest on the Pension Fund amount accrues at $483.02/day, and interest on the Health and Welfare Fund amount accrues at $13.04/day.

Cartage does not dispute these amounts, nor does it dispute the $57,033.94 in audit fees, and $1,767.75 in audit costs, also sought by plaintiffs. It does dispute, however, the $56,593.88 in attorneys' fees and $4,189.61 in costs requested by plaintiffs. Cartage's objections are twofold. First, it argues that because plaintiffs' attorneys are plaintiffs' own employees, to award them attorneys' fees based on market rates would result in a windfall for the funds. [4] It maintains that any fee award should be limited to the amount that plaintiffs actually spent in prosecuting this action, that is, their lawyers' salaries plus overhead.

The use of a cost-based, rather than a market-rate, method, however, unnecessarily complicates the already

difficult task of determining reasonable attorney fees. State of Ill. v. Sangamo Constr. Co., 657 F.2d 855, 861-862 (7th Cir. 1981). In addition: "For every hour that in-house counsel spent on this case, plaintiffs lost an hour of legal services that could have been spent on other matters. The value to plaintiffs of this lost time is, of course, the amount it would require to hire additional counsel to do the neglected work." Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387, 1397 (7th Cir. 1983). Therefore, the Court will calculate plaintiffs' attorneys' fees according to a market-rate standard.

Cartage's second argument is that plaintiffs' time logs do not distinguish between the time spent working on their successful claims against Cartage, that is, Count I and II, and time spent on Counts III and IV, which are separate theories of recovery directed solely against Transport that plaintiffs have not prevailed upon. It is well settled that if a suit is [5] comprised of unrelated claims, the hours spent on unseccessful claims should be excluded from determining a fee aware. Hensley v. Eckerhart, 103 S.Ct. 1933, 1943 (1983). Plaintiffs acknowledge this, though, and only ask for seventy-five percent of their total costs and fees, which they estimate was the percentage of time spent on their claims against Cartage. The Court finds this figure to be reasonable in light of the fact that the bulk of time spent on motions and discovery in this case related to plaintiffs' claims against Cartage.

Cartage does not challenge the reasonableness of any of the individual time entries submitted by plaintiffs. Nonetheless, the Court has reviewed the entries, and generally finds them to be reasonable, with a few exceptions. First, plaintiffs claim at least 48.2 hours of unexplained discovery work, typically described only as "review and revise discovery materials." Because of the vagueness of these descriptions, the Court has reduced these entries by twenty-five percent of $1,355.63. See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 776 F.2d 646, 656-658 (7th Cir. 1985). Similarly, the Court also

reduces by twenty-five percent the time spent on thirty-two "conferences re status," billed by Mr. Madden at .3 each, for a total of $270.00 This reduction does not apply to conferences [6] more fully described as regarding discovery, the audit, or other matters.

The Court also finds that the 2.0 or 2.5 hours billed by Mr. Madden for each court appearance is excessive. Accordingly, the time for each appearance has been reduced to one hour, for a total reduction of $1,687.50. In addition, the Court disallows the 4.5 hours, or $506.25, billed by Mr. Madden on 12/15/93 to review the file. Anyone who spent as much time as Mr. Madden did on this case should not need to take half a day to familiarize himself with the file midway through litigation. Finally, the Court notes that the Westlaw charges billed by plaintiffs as costs are more appropriately recovered as attorneys' fees, but the final effect is the same in this case because plaintiffs have been awarded both costs and fees.

Therefore, pursuant to Rule 54(b), the Court finds that all claims regarding Cartage have been resolved, and hereby enters final judgment against it in favor of plaintiffs. Plaintiffs are awarded the unpaid contributions and doubled interest as described earlier. The Court also awards plaintiffs a total of $56,964.11 in attorneys' fees and costs, and $58,801.68 in audit fees and costs, to be allocated equally between the Pension Fund and the Health & Benefit Fund. [7] Plaintiffs are directed to resubmit their proposed final judgment order consistent with this opinion within seven days.

MR. MADDEN: Thank you, your Honor.

MR. PARZIANELLO: Thank you.

(Which were all the proceedings had in the above-entitled cause.)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 26, 1996

Before HON. FRANK H. EASTERBROOK, Circuit Judge

Nos. 94-3823, 95-1872 and 95-1976

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and ROBERT J. BAKER, TRUSTEE,
Plaintiffs-Appellees,

v.

CENTRAL CARTAGE COMPANY and CENTRAL TRANSPORT, INCORPORATED,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 91 C 6232—Harry D. Leinenweber, Judge

Upon consideration of:

1. "APPELLEES' STATEMENT OF ATTORNEYS' FEES" filed on February 5, 1996, by counsel; and,

2. "RESPONSE TO APPELLEES' STATEMENT OF ATTORNEYS' FEES" filed on February 20, 1996, by counsel for appellants,

IT IS ORDERED that the appellees are awarded attorneys' fees in the amount of $17,467.50.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 13, 1996

Before
HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. TERENCE T. EVANS, Circuit Judge

No. 95-2026

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, Trustee,
Plaintiffs-Appellees,

v.

THE MASON AND DIXON LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 93 C 7497—David H. Coar, *Judge*

ORDER

Our order of February 7, 1996, granted the Pension Fund's request for an award of attorney's fees on appeal. Notwithstanding that order, Mason & Dixon Lines opposes both the fact and the amount of the award sought.

1. The employer's argument against *any* fees ignores the ground on which this court awarded them: not that

the employer's position on appeal flunked the "substantial justification" requirement, but that the Pension Fund had been awarded legal fees in the district court and was entitled to an award for the legal time necessary to defend them on appeal. See *Commissioner of INS v. Jean*, 496 U.S. 154 (1990). The court's order awarding fees stands.

2. The employer does not dispute the hourly rates the Pension Fund uses but nonetheless asks us to cut the Pension Fund's request in half. There is no basis for that step. The calculations in the Pension Fund's statement of fees are sound, and a total of $10,707.07 is a modest amount for the work reflected in the brief filed in response to the employer's appeal.

Accordingly, the Pension Fund is awarded a total of $10,926.67 on account of costs and legal fees.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 95-392 April 24, 1995
Sharing Legal Fees with a
For-Profit Corporate Employer

If a corporate in-house lawyer provides services to third persons for a fee, the lawyer violates Model Rule 5.4(a) if the lawyer turns over to the corporation any portion of the fee beyond the cost to the corporation of the services provided. Similarly, if an in-house lawyer represents her corporate employer in successful litigation in which counsel's fees are awarded to the lawyer, it is a violation of Model Rule 5.4(a) for her to share with the corporate employer any portion of the fees awarded to her beyond the amount that would reimburse the corporation for the corporation's cost of its in-house counsel's handling of the matter.

The Committee has received two inquiries raising questions concerning the ethical propriety of allowing cor-

---

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312) 988-5300 CHAIR: Margaret C. Love, Washington, DC ☐ Richard L. Amster, Roseland, NJ ☐ Deborah A. Coleman, Cleveland, OH ☐ Ralph G. Elliot, Hartford, CT ☐ Lawrence J. Fox, Philadelphia, PA ☐ David B. Isbell, Washington, DC ☐ George W. Jones, Jr., Washington, DC ☐ Marvin L. Karp, Cleveland, OH ☐ Arthur W. Leibold, Jr., Washington, DC ☐ Kim Taylor-Thompson, Stanford, CA ☐ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Joanne P. Pitulla, Assistant Ethics Counsel.

porations to receive payment for certain work performed by in-house counsel. The first situation involves a corporation that is not generating enough legal work to keep its salaried lawyers busy. The Committee has been asked whether it is proper for such a corporation to "rent" its in-house lawyers to perform legal work for other clients, and to collect a fee for the services at an hourly rate higher than the cost to the corporation of employing them. The second situation the Committee has been asked to consider is that of a lawyer working in-house at a corporation who successfully litigates a case on behalf of the corporation and is in a position to seek an award of lawyer's fees under a fee-shifting statute. May the lawyer share with her corporate employer a "reasonable attorney's fee" based on an hourly rate that exceeds the cost the corporation incurred in employing the lawyer?

The Committee is of the view that the two situations described above present examples of ethically improper fee sharing, if the in-house counsel is required to share legal fees with the nonlawyer corporate employer. These arrangements certainly run afoul of the literal language of Rule 5.4(a) of the Model Rules of Professional Conduct (1983, as amended), which provides that a "lawyer or law firm shall not share legal fees with a nonlawyer. . . ." The Committee also concludes that these two arrangements, unlike the arrangement condoned in Formal Opinion 93-374 (Sharing of Court-Awarded Fees With Sponsoring Pro Bono Organizations), violate not only the literal language but also the reasons behind Rule 5.4(a)'s prohibition.

Rule 5.4 of the Model Rules of Professional Conduct is titled "Professional Independence of a Lawyer," and the purpose of its provisions is to safeguard that independence and prevent problems that might occur when nonlawyers assume positions of authority in business arrangements

with lawyers.[1] Among the problems Rule 5.4 seeks to prevent, the most important is interference by lay persons with a lawyer's practice. The involvement of nonlawyers, such as corporate employers, in the legal process is of concern because the lawyer's independent professional judgment can be impaired by the influence and control of nonlawyers who, by definition, are not subpect to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important

---

[1] Model Rule 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that law the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

provisions of the profession's code of conduct. "[F]ee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate . . . ." *Emmons, Williams, Mires & Leech v. State Bar*, 6 Cal. App. 3d 565, 573-74, 86 Cal. Rptr. 367, 372(1970).

An examination of the history of Rule 5.4(b), prohibiting lawyers from practicing law in partnership with nonlawyers, provides compelling evidence that the ABA's disapproval of fee sharing historically has been tied to the desire to prevent lay influence of a lawyer's professional judgment. In 1976, the Kutak Commission, which was appointed to recommend revisions to the 1969 Model Code of Professional Responsibility, proposed a rule that was designed to prevent the dangers inherent in fee sharing without prohibiting fee sharing altogether. That rule proposed that lawyers be allowed to share fees with nonlawyers, even in profitmaking enterprises, so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the rules of legal ethics regarding confidentiality, solicitation, and legal fees. However, when the ABA House of Delegates debated a final draft of the rules, a delegate asked if the proposed rule would "permit a business corporation such as Sears Roebuck or H & R Block to open law offices staffed by salaried lawyers in shopping centers across the country." The Reporter responded affirmatively. An impassioned debate then followed and the ABA House of Delegates rejected the proposed rule and instead adopted an absolute ban on fee sharing, continuing the previous ban in DR 3-103(A) of the Model Code of Professional Responsibility. This history demonstrates that the present rule reflects grave concern regarding corporate involvement with law firms and lawyers, especially involvement that was tied to the sharing of legal fees. *See* Roy D. Simon, Jr., Fee Sharing Between Lawyers and Public Interest Groups, 98 YALE L.J. 1069, 1082-1083 (1989).

For the reasons Rule 5.4 was adopted and for the reasons articulated below, the Committee concludes that, while a corporation should be free to require its lawyers to reimburse its costs of employing in-house counsel when the lawyers do work for others, or to be made whole for the costs it actually incurred in a case when its lawyers are awarded fees by a court, a corporation may not reap profits from the work of its in-house attorneys. The arrangements that are the subject of these inquiries run the risk of further "transforming the practice of law into an ordinary commercial business, with the resulting unrestricted emphasis on the hard sell and the bottom line," and violate Model Rule 5.4(a) both in word and spirit. Simon, *supra* at 1132.

A Corporation's Practice of Charging Other Businesses for the Services of Its Salaried In-House Attorneys, at a Rate Higher Than Their Hourly Cost to the Corporation, Amounts to Improper Fee Sharing with Nonlawyers

If anything is clear under Model Rule 5.4, it is that a corporation cannot hire one or more lawyers, pay them salaries, make their services available generally to others, and directly receive the fees for the lawyers' work. This is precisely the scenario that propelled the ABA House of Delegates to adopt present Model Rule 5.4(a). When stripped of the facts relating to the corporation's motive for "renting" its in-house counsel—the corporation does not have enough work to keep the lawyer busy full-time—the question presented by this inquiry is whether a corporation can do exactly the same thing by renting out part, rather than all, of the time of the lawyer employees. The Committee concludes that the answer is clearly that it cannot, since the same concerns that prompted the rule barring the full-time employment of lawyers by corporations to provide third party service for profit to the corporation are present here: first, avoiding the possibility of a nonlawyer's interference with the exercise of a lawyer's

independent professional judgment; second, ensuring that the client is treated fairly by not being overcharged.

Regarding the first concern, it is clear that if the proposed arrangement were permitted, the profit potential to the corporation would encourage greater interference with the professional judgment of a lawyer than would occur if the corporation simply were to receive reimbursement of costs. If in-house counsel were "rented" at a profit by their employers, the employers could have a greater incentive to have a say in selecting the matters the lawyers could undertake during their extra time. Furthermore, the corporation would be further encouraged to decide how much of its attorneys' time would be spent on outside matters. And, as is evidenced by the inquiry posed to the Committee, the corporation would have a real motive to determine the fees to be charged to the clients. Each of these decisions, and others like them, should be the decisions of the lawyer. If the profession were to permit these decisions to be made by corporations, it would, in effect, be permitting lay persons to interfere in the professional judgment of lawyers or engage in the unauthorized practice of law.

The second major concern with the proposed arrangement is that the fees charged to clients by the corporation may be excessive. Because a corporate entity is not subject to the ethical rules governing the legal profession, it is possible that if a corporation were given the authority to set fees for others' use of its in-house counsel, it would set them at unreasonable rates. For-profit corporations, by definition, are motivated by anticipated profits and concerned with the "bottom line." Indeed, that motivation is evidenced in the situation presented by this inquiry —because the corporation cannot keep the lawyers busy on a full-time basis, the corporation wants to rent out its lawyers at a rate that would earn a profit for the corporation. If a corporate entity is permitted to set its lawyers' fees at whatever rate it chooses, such fees run the risk of

being unreasonable. Unlike the situation where fees are set by the lawyer, who is restricted by the ethical mandate of Model Rule 1.5, there are no such limitations on the corporation.

The risk of overcharging the clients served by the in-house lawyer would be much less if the corporation were to be reimbursed only for the actual cost of allowing their in-house counsel to serve others. While this would not eliminate the possibility that the reimbursement rate itself was unreasonable, it would at least remove the problems that arise when a corporation is in a position to view its legal department as a profit center.

It is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation. So long as the lawyers do not permit any interference by the corporate employer with their professional judgment and are in a position to give conflct-free representation to their other clients, there is nothing unethical about the arrangement.

Other ethics committees that have considered the issue agree that a corporation should not be permitted to reap a profit from the services of its attorneys. The Legal Ethics Committee of the District of Columbia Bar concluded that in-house counsel may provide legal services to clients of a corporation provided that *none of the fees* generated by the services go to nonlawyers except to compensate staff workers under the lawyer's supervision. District of Columbia Bar, Legal Ethics Committee, Opinion 135 (1984). That committee's concern was that if fees went to nonlawyers, the nonlawyers would have the ability to influence the lawyer's professional judgment. The Ethics Committee of the Massachusetts Bar Association followed the same line of reasoning in concluding that an attorney employed by a bank could not participate in an arrangement in which the bank charged mortgagors more for the attorney's services than the bank's own costs for attorney's services. Massachusetts Bar Association

Ethics Committee, Opinion 84-1 (1984). Likewise, in a Dallas Bar Association opinion, the Legal Ethics Committee stated, "An attorney is considered to be sharing legal fees with a nonlawyer forming a partnership with a nonlawyer for the practice of law if the employing corporation reaps any benefit, reward or profit from the attorney's provision of legal services to third parties." Dallas Bar Association, Legal Ethics Committee, Opinion 1982-3 (1982). This Committee agrees with these views and adopts what already appears to be the consensus on this issue: corporate counsel may not be used to earn money for a for-profit employer.

It has been suggested that in the proposed situation the corporation technically would not make a "profit" from the attorneys' fees because the funds received by the corporation would, in total, be less than the costs of running the legal department. The Committee does not believe that this argument changes the analysis. The corporation is still reaping more than reimbursement for its costs of employing its lawyers, and even if the funds were to be pumped back into the legal department, the corporation still would have the same incentive to interfere with the independence of the lawyer to maximize its ability to recoup its losses or free up funds for the corporation's general use.

The Contribution of Court-Awarded Fees to a Corporate Employer, When the Fees Amount to More than the Employer's Cost for the Services, Is Improper Fee Sharing with Nonlawyers

Under certain fee-shifting arrangements the courts award legal fees to the parties. Under others the fee award is made to the lawyers. Because in the former case the fee is directed to the corporation, no ethical question is raised; the lawyer is not placed in a position in which she is being asked to share fees with a nonlawyer. However, it is in the latter situation, where the

lawyer is awarded the fee and the corporation seeks from the lawyer some or all of the fee award, that ethical questions are raised to which this portion of the opinion is addressed.

The literal language of Rule 5.4(a) is clear, flatly prohibiting a lawyer from sharing the profits and losses of a law practice with a nonlawyer even when the lawyer retains control over all legal aspects of the business. The literal application of Rule 5.4(a) prohibits a lawyer from sharing with a corporation a court-awarded fee when that fee is greater than the costs of the lawyer's services to the corporation.

Furthermore, the purpose of Rule 5.4(a), to prevent lay interference with a lawyer's professional independence, would be ignored if a corporation were allowed to make a profit in this fashion. Certainly, the attorneys' themselves would be entitled to court-awarded fees. And it would not be problematic for the corporation to be reimbursed for its out-of-pocket costs attributable to a particular case. But allowing a lawyer to share with a corporation more than its costs in the litigation would give corporations an incentive to pursue litigation (and even an incentive to purchase claims of others) that went beyond the merits of the claims themselves, creating a situation in which the provision of legal services by in-house lawyers became a profit center for the enterprise. And once the corporation found itself with an opportunity to create a profit center from its employment of lawyers, the corporation's incentive to interfere with its lawyers' handling of matters would be enhanced. Given that a corporation unquestionably has the *power* to influence its employees (including lawyers), it is surely unwise to also give it the additional incentive to do so. Interference by the corporation with its in-house lawyers' practice, motivated by this profit opportunity, would amount to the unauthorized practice of law and should not be permitted or encouraged.

This interpretation of Rule 5.4(a) follows the same reasoning employed by the court in *National Treasury Employees Union v. U.S. Dept. of Treasury*, 656 F.2d 848 (D.C. Cir. 1981). In that case, where two attorneys were salaried employees of a union and were compensated by the union at rates well below market value, the union sought the market value of services rendered in its request for court awarded fees to its lawyers under a fee-shifting statute, and claimed that the fees belonged to it rather than to the lawyers. The Court ruled that an award of attorney's fees could not exceed the union's financial outlay because anything more would result in a profit to the union. The union could not be permitted to reap a profit on the services its lawyers had furnished because that would necessarily involve the union in the unauthorized practice of law. The Court stated that the ethical maxims it was honoring were valuable as safeguards against the imposition through lay control of incompetent and irresponsible law practice on the public.

The situation presented to the Committee is analogous to the *National Treasury* case. Despite the fact that here the Committee is confronted with a profit-seeking corporation rather than a union, the ethical considerations remain the same and for the same reasons it would be improper to allow the corporation to recover more than its financial outlay.[2]

This Committee recognized an exception to the rule prohibiting fee sharing in Formal Opinion 93-374. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-374 (1993). In that opinion this Committee decided that it was not improper for a lawyer to agree to share court awarded fees with a non-profit organiza-

---

[2] *See also People v. People's Stock Yards State Bank*, 176 N.E. 901 (Ill. 1931) (bank's practice of retaining court-awarded fees based on work done by the legal department on foreclosure suits on loans owned by the bank condemned because bank was engaging in unauthorized practice of law.)

tion that sponsors litigation. While that opinion is important, it is distinguishable from this situation because, although both involve court-awarded fees, the organization seeking those fees in the situation at hand is a for-profit corporation, not a non-profit corporation or other organization.

In Formal Opinion 93-374 the Committee recognized that, when court-awarded fees are involved, *one* of the inherent dangers of fee sharing with nonlawyers is not present: the risk of charging excessive fees to clients. When a court decides the proper amount of fees to award an attorney, a reasonable expectation is that the fee will be fairly determined and proportionate to the work performed.

Moreover, Formal Opinion 93-374 made it clear that the exception to the literal language of Model Rule 5.4 was limited to non-profit organizations because the expectation of receiving a fee is unlikely in these circumstances to be the source of lay interference with the lawyer's professional judgment. The fact "that the entity with which such fees are shared is a non-profit entity [is] a fact that has weight both in relation to the letter and purposes of the Model Rules and as a legal matter."

As the Opinion noted:

> For the non-profit organization, any incentive to intervene in sponsored litigation is much more likely to relate to the merits of the case, rather than the expectancy of a fee award; the element of a fee, in other words, does not provide a reason why the prohibition of paragraph (c) is not sufficient in the circumstances. That consideration is what distinguishes the case of a staff lawyer working for a non-profit organization from the case of a lawyer employed by a for-profit organization sponsoring litigation, at least for purposes of the prohibition on fee sharing in Rule 5.4(a).

The opinion then went on to observe that its view that Rule5.4(a)'s prohibition against fee sharing only applies to for-profit corporations

> is supported by the provisions of paragraph (d) of the Rule, which applies its prohibition on lay participation in the practice of law only to corporations and associations 'organized to practice law for a profit.' This provision recognizes that even though a non-profit organization may well have an economic interest in securing sources of funds, including court-awarded attorney fees, to support its otherwise economically disinterested activities, the danger of improper lay interference in such circumstances is minimal.

We, therefore, conclude that a for-profit corporation should not share in court-awarded attorney's fees with respect to services provided by its lawyer employees, to the extent such fees are in excess of the corporation's cost of providing the legal services in question. It is permissible for the corporation to be reimbursed for its costs, and its lawyers can receive directly fees in excess of the corporation's cost, but it is unethical for the lawyer to share that excess with the corporation.

Conclusion

For the reasons stated above, we conclude that both of the proposed arrangements are improper and violate both the literal language of and principles behind Rule 5.4(a).